Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

TECHNICAL SERGEANT DALE P. KEYSER,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

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December 2004

QUESTIONS PRESENTED

I. Whether an Airman's admission during a plea inquiry that his conduct was prejudicial to good order and discipline and of a nature to bring discredit upon the armed forces was "voluntary" and "intelligent" when, at the time he made it, he had just been misinformed that his conduct violated federal law.

II. Whether Article 134 of the Uniform Code of Military Justice, 10 U.S.C. § 934, is overly broad and void for vagueness as applied.

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The petitioner, Technical Sergeant Dale P. Keyser, respectfully prays that a Writ of Certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on September 20, 2004.

OPINIONS BELOW

The unpublished order and judgment of the United States Court of Appeals for the Armed Forces, *United States v. Keyser*, USCA Dkt. No. 02-0233/AF, is located at Appendix A. The unpublished opinion of the United States Air Force Court of Criminal Appeals (No. ACM 34252, November 28, 2001) is located at Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on September 20, 2004.[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) and 10 U.S.C. § 867(a)(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech." The Due Process Clause of the Fifth Amendment to the United States Constitution states that "No person shall . . . be deprived of life, liberty, or property, without due process of law."

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[1] Appendix A, p. 2a.

Section 2256(8) of Title 18, United States Code, contained the following definition that applied to a violation of Section 2252A of the same title:

> "child pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where–
>
> (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
>
> (B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct;
>
> (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or
>
> (D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.

Article 134, Uniform Code of Military Justice (UCMJ), Section 934 of Title 10, United States Code [hereinafter Article 134], provides:

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

STATEMENT OF THE CASE

On August 2, 2000, the petitioner was tried by a general court-martial composed of a military judge sitting alone. The petitioner pleaded guilty to knowingly receiving child pornography in interstate or foreign commerce in violation of Section 2252A(a)(2)(A), as assimilated under clause 3 of Article 134, UCMJ.

In discussing the offense with the petitioner while obtaining his guilty plea, the military judge used the same unconstitutionally overbroad definitions of "child pornography" contained in Section 2256(8)(B) and Section 2256(8)(D) that this Court struck down in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). (R. at 16). The military judge also added what he termed to be a "fourth element:"

> That, under the circumstances, [the petitioner's] conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(R. at 15).

In pleading guilty, the petitioner admitted that the elements and definitions taken together correctly described what he did. Specifically, he admitted that he had downloaded images of what appeared to be minors engaging in sexually explicit conduct on his personal home computer. When the military judge asked him why he believed his conduct was wrongful, the petitioner replied, "Because it's against the law." (R. at 26).

When the military judge asked him why he believed that his conduct was prejudicial to good order and discipline or

was of a nature to bring discredit upon the armed forces, the petitioner stated, "Because I believe that type of conduct would bring down the image of the Air Force." (R. at 26). The military judge stated, "That's if either other military members or members of the public knew that an Air Force member was receiving such images," to which the petitioner replied, "Yes, sir." The military judge then added, "And I don't want to put any words in your mouth. But, as I understand what you're saying is that if your conduct was known by others, that would be harmful to the reputation of the armed services and therefore, bring discredit?" The petitioner again replied, "Yes, sir." (R. at 27).

After accepting the petitioner's guilty plea, the military judge sentenced the petitioner to a bad conduct discharge, confinement for eight months, reduction to the grade of E-1, and forfeiture of all pay and allowances. On November 28, 2001, the Air Force Court of Criminal Appeals affirmed the findings and the sentence.

On September 20, 2004, the United States Court of Appeals for the Armed Forces granted review on the following issue:

> WHETHER, IN LIGHT OF *ASHCROFT V. FREE SPEECH COALITION*, 535 U.S. 234 (2002), THE APPELLANT'S GUILTY PLEA IS PROVIDENT.

In an order released that same day, the Court of Appeals amended the petitioner's charge by striking language from the charged offense that referenced Section 2252A. Appendix A, p 2a. The Court then cited its two decisions in *United States v. Mason*, 60 M.J. 15 (C.A.A.F. 2004) (App. D at 30a) and *United States v. O'Connor*, 58 M.J. 450 (C.A.A.F. 2003) (App. C at 10a) and summarily affirmed the petitioner's conviction under clauses 1 and 2 of Article 134. These clauses provide that a court-martial may punish any

act or *omission* that is prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces.

REASONS FOR GRANTING THE WRIT

This case presents two questions of fundamental importance to the administration of justice in the military. The first question concerns the extent to which an improvident guilty plea can be used to affirm a conviction for the same offense on alternative grounds. The second--and more pressing--question asks this Court to address the extent to which servicemen and women enjoy First Amendment rights in their private lives. It also asks whether a military member of ordinary intelligence would know that he could be punished for receiving and viewing protected speech in the privacy of his own home when no regulation or law expressly prohibits it. Because the answers to these questions affect everyone in the military, this Court should examine them.

I. The petitioner's improvident plea cannot be used to affirm a conviction on different grounds.

This Court has long held that a guilty plea is not voluntary if an accused "has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt." *Henderson v. Morgan*, 426 U.S. 637, 645 n.13 (1976). "[A] plea does not qualify as intelligent unless a criminal defendant first receives 'real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process.'" *Bousley v. United States*, 523 U.S. 614, 618 (1998) (quoting *Smith v. O'Grady*, 312 U.S. 329, 334 (1941)). Such notice is all the more critical when a decision of this Court places conduct "beyond the power of the

criminal law-making authority to proscribe" and there is "a significant risk that a defendant stands convicted of an 'act that the law does not make criminal." *Bousley*, 523 U.S. at 620 (citations omitted).

In *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), this Court placed certain speech—speech that is neither obscene nor the product of sexual abuse—beyond the power of Congress to proscribe. This Court held that portions of the Child Pornography Prevention Act of 1996[2] were overbroad and therefore unconstitutional. Specifically, this Court struck down the language of "appears to be a minor" in Section 2256(8)(B) and the language "conveys the impression" in Section 2256(8)(D). This Court stated that it was concerned with the proscription of speech that recorded no crimes and created no victims by its production. *Id.* at 250. Virtual child pornography is such a form of speech.

In the petitioner's case, the military judge used the very same definitions containing the language "appears to be a minor" and "conveys the impression" that this Court found to violate the Constitution. (R. at 16). For this reason, the U.S. Court of Appeals for the Armed Forces apparently concluded that the petitioner had an incomplete understanding of the charged offense and that the petitioner did not admit that the images he received were of actual children. The Court of Appeals therefore acquitted him of the charged offense by deleting from the charged offense any reference to Section 2252A. Appendix A, p. 2a. The Court nevertheless affirmed the petitioner's conviction under clauses 1 and 2 of Article 134 using the same guilty plea, apparently for knowingly receiving virtual child pornography.

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[2] The Child Pornography Prevention Act of 1996 amended Title 18 of the United States Code by revising Sections 2251, 2252, and 2256, and by adding Section 2252A.

Although the Court of Appeals did not explain its reasoning in acquitting him of the charged offense and in affirming the petitioner's conviction under clause 1 and clause 2 of Article 134, the Court did state that it was doing so in light of its decisions in *O'Connor*, (Appendix C, p. 10a), and in *Mason*. (Appendix D, p. 30a). A brief summary of those decisions would therefore be helpful in shedding light on the Court's reasoning in the petitioner's case.

In *O'Connor*, the Court of Appeals for the Armed Forces held that O'Connor's guilty plea to a violation of Section 2252A, as assimilated under clause 3 of Article 134, was improvident because the military judge had used the same overbroad definitions of child pornography that this Court struck down in *Free Speech Coalition*. The Court of Appeals stated that it was unclear from the plea inquiry and the record whether O'Connor was pleading guilty to possession of virtual or actual child pornography. In the absence of any discussion or focus in the record regarding the "actual" character of the images, the Court stated that it could not conclude that O'Connor's guilty pleas to violations of Section 2252A, as assimilated under clause 3 of Article 134, were provident. Appendix C, p. 18a.

The Court of Appeals then considered whether O'Connor's guilty plea could be affirmed under clause 1 or clause 2 of Article 134, UCMJ. The Court explained that conduct "is punishable under Article 134 if it prejudices 'good order and discipline in the armed forces' [clause 1], or if it is 'of a nature to bring discredit upon the armed forces' [clause 2], or if it is a crime or offense not capital [clause 3]." Appendix C, p. 13a. In discussing the interplay between the three clauses under Article 134, the Court stated, "The three clauses do not create separate offenses, but rather provide alternative ways of proving the criminal nature of the charged misconduct." *Id.* (citation omitted).

The Court of Appeals then concluded that O'Connor's guilty plea could not be used to affirm a conviction under clause 2 of Article 134. Although O'Connor had actually stipulated that his conduct was also service discrediting, the Court stated that the absence of any discussion of that element during the plea inquiry by either O'Connor or the military judge gave it pause. Appendix C, p. 19a. The Court reasoned that O'Connor, in pleading guilty, was focused on the question of whether or not his conduct violated Section 2252A, not whether his conduct was service discrediting. Because there was no conscious discussion of the service discrediting character of his conduct on the record, the Court concluded that O'Connor may not have understood the nature of the prohibited conduct. Accordingly, the Court of Appeals did not affirm a conviction under any other clause of Article 134.

But the Court of Appeals in *O'Connor* expressly left open the question of whether, in the wake of *Free Speech Coalition*, the possession of virtual child pornography can be punishable as service discrediting conduct under clause 2 of Article 134. Appendix C, p. 20a. The Court affirmatively answered this question in *Mason*, the other decision the Court cited in affirming the petitioner's conviction under clauses 1 and 2 of Article 134.

In *Mason*, the Court of Appeals for the Armed Forces found that Mason's guilty pleas to offenses under Section 2252A were improvident for the same reasons as those discussed in *O'Connor*. But unlike the situation in *O'Connor*, the Court of Appeals also held that Mason's guilty pleas could be used to affirm a conviction under clauses 1 and 2 of Article 134. During the plea inquiry, the military judge included what he termed a "fourth element." Appendix D, p. 34a-35a. This element addressed the prejudicial and service discrediting character of Mason's conduct. The military judge explained that he was adding

this "fourth element" in the event it is determined on appeal that his plea is improvident on the charged offense. Appendix D, p. 35a. Mason stated that he understood the "fourth element" and why it had been included. *Id.* He then admitted that his conduct was both prejudicial and service discrediting. Appendix D, p. 36a. Significantly, Mason admitted on the record that he was a commissioned officer in the United States Air Force and that he had received and viewed the pornographic images on a government computer at his workplace. Appendix D, p. 39a. The Court stated that, under *those* circumstances, the status of the images as "virtual" or "actual" child pornography was of no consequence. Appendix D, p. 40a. The Court observed that the military judge had explained the clause 1 and clause 2 elements of Article 134 to Mason as a basis for finding his conduct criminal apart from clause 3 of Article 134. Appendix D, pp. 38a-39a. The Court noted that Mason's discussions with and admissions to the military judge on the clause 1 and clause 2 elements were made in that context and that its decision in *Mason* was "clearly distinguishable" from its decision in *O'Connor* on that specific ground:

> The plea colloquy in *O'Connor* was focused solely on "the nature of the prohibited conduct" under the CPPA, without any discussion or acknowledgement of the criminal nature of the conduct deriving alternatively (and independently) from its character as service-discrediting or prejudicial to good order and discipline. 58 M.J. at 455. Absent any discussion with the military judge as to how his conduct might be criminal under clause 1 or 2 as distinct from criminal under clause 3, we could not view O'Connor's guilty plea as provident to a lesser-included offense under clause 2.

Appendix C, p. 38a. Accordingly, the Court of Appeals affirmed Mason's conviction under both clause 1 and clause 2 of Article 134.

In the petitioner's case, the Court of Appeals apparently concluded that it could affirm the conviction under clauses 1 and 2 of Article 134, because the petitioner, like the appellant in *Mason*, admitted on the record that his conduct was both prejudicial and service discrediting. But the petitioner's case is unlike *Mason* in three important respects.

First, the military judge did not explain to the petitioner why he was adding a "fourth element" or that this element would provide a basis for finding his conduct criminal apart from clause 3 of Article 134. Thus, the petitioner's discussions with the military judge on the additional element were *not* made in that context. Rather, the petitioner's case is more like *O'Connor* in that the petitioner was focused solely on the charged offense in pleading guilty.

Second, the petitioner agreed that his conduct was prejudicial and service discrediting only after the military judge told him that it was against federal law to possess virtual child pornography. It was in this context that the petitioner made his statements about the "fourth element." Just before he made these statements, the petitioner had stated that his conduct was wrongful because "it's against the law." His admission regarding the "fourth element" cannot be read apart from his statements that revealed his misunderstanding of the law. He was, after all, improvidently pleading guilty to the charged offense that had been assimilated under clause 3 of Article 134.

Third, and more importantly, the petitioner did not disclose any facts during the plea inquiry that could objectively support a conviction based on his discussion of the "fourth element." Unlike the appellant in *Mason* who

was an officer and had downloaded pornographic images onto his government computer at his work place, the petitioner is an enlisted man who received and viewed pornographic images on his personal computer in the privacy of his own home. The petitioner did not admit that the images he viewed were obscene or that they depicted real children. The charged offense did not allege any such thing. The petitioner might not now agree that his conduct was either prejudicial or service discrediting in light of this Court's decision in *Free Speech Coalition* regarding what actions are lawful.

It cannot be said, therefore, that the petitioner's guilty plea to the "fourth element" was "voluntary" and "intelligent" as the Constitution requires it to be. Because the decision of the U.S. Court of Appeals for the Armed Forces in this case conflicts with relevant decisions of this Court on the constitutional requirement that a plea be "voluntary," this Court should exercise its supervisory power and grant the petition on the first question presented.

II. The petitioner lacked "fair warning" that his conduct was prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces.

The second question asks this Court to examine whether Article 134 as it was applied in this case is overly broad under the First Amendment and is void for vagueness under the Fifth Amendment. The petitioner does not challenge the constitutionality of Article 134 as a whole.

Clauses 1 and 2 of Article 134 provide that a court-martial may punish any *act* or *omission* as long as the act or omission was either prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces. In this case, the petitioner stands convicted of knowingly

receiving virtual child pornography on his personal computer at his home. But the charged offense did not allege and the petitioner did not admit that the images were obscene. Thus, the petitioner's conviction should be affirmed only if the mere possession of virtual child pornography, without more, is *per se* prejudicial or service discrediting.

The U.S. Court of Appeals for the Armed Forces apparently reached this conclusion. To do so, however, the Court must have also necessarily concluded that, by definition, the virtual images had no value of any kind—political, scientific, literary, or artistic. But such a conclusion ignores the concerns this Court stated in *Free Speech Coalition* about the government's proscription of speech that is neither obscene nor the product of sexual abuse.

If the decision of the Court of Appeals in this case is allowed to stand, the government will have arbitrarily diminished the First Amendment rights of its servicemen and women. Even worse, servicemen and women will necessarily be reduced "to reading only what is fit for children" or risk being criminally prosecuted for matters about which they have no "fair warning." The peril arises when the proscribed speech is constitutionally protected in the larger civilian society and there is no government regulation expressly prohibiting it in the military. A military member of ordinary intelligence must therefore speculate as to what is prohibited.

To be sure, the First Amendment rights of servicemen and women are not necessarily coextensive with those of ordinary citizens. As this Court has stated in *Parker v. Levy*, 417 U.S. 733 (1974):

> While the members of the military are not excluded from the protections granted by the First Amendment,

> the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.

Id. at 758 (affirming a conviction under Article 134 where an officer had *publicly* urged enlisted personnel to refuse to obey orders which might send them into combat).

But this is not a case where the petitioner openly urged subordinates to disobey orders or where he provided unsuitable materials to others. This is a case about what he viewed in the privacy of his own home. This Court has never clarified the extent to which military members do or do not enjoy First Amendment rights in their private lives. The absence of guidance of this kind leaves a void that raises serious questions about the "fair warning" and "notice" that military members have about conduct for which they can be punished but ordinary citizens are free to engage in. A new recruit and a seasoned veteran alike may fairly ask if he or she can legally acquire, for example, copies of movies such as "American Beauty" or "Traffic" or some modern production of "Romeo and Juliet" without being subjected to a court-martial. Men and women "of common intelligence must necessarily speculate as to what . . . conduct to the 'prejudice of good order and discipline in the armed forces' or conduct 'of a nature to bring discredit upon the armed forces' really means." *Parker v. Levy*, 417 U.S. at 762 (Blackmun, J, dissenting).

In the wake of *Free Speech Coalition* and in the absence of any government regulation prohibiting the receipt of virtual child pornography, this case presents an important

constitutional question that has not been, but should be, *settled by this Court. This Court should therefore grant the* petition on the second issue.

CONCLUSION

Because this Court has not yet settled the extent to which servicemen and women enjoy First Amendment rights in the privacy of their own homes, the petitioner respectfully requests that this Court grant his petition for a Writ of Certiorari.

Respectfully submitted,

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December 2004

Appendix A

UNITED STATES, Appellee

v.

Dale P. KEYSER, Appellant

No. 02-0233

Crim. App. No. 34252

United States Court of Appeals for the Armed Forces

Decided September 20, 2004

On consideration of Appellant's Petition for Grant of Review, and in light of this Court's decisions in *United States v. Mason*, 60 M.J. 15 (C.A.A.F. 2004), and *United States v. O'Connor*, 58 M.J. 450 (C.A.A.F. 2003), it is, by the Court, this 20th day of September, 2004,

ORDERED:

That the Petition for Grant of Review is granted on the following issue:

> WHETHER, IN LIGHT OF *ASHCROFT v. FREE SPEECH COALITION*, 535 U.S. 234 (2002), THE APPELLANT'S GUILTY PLEA IS IMPROVIDENT.

Specification 1 of the Charge is amended to read as follows:

> In that TECHNICAL SERGEANT DALE P. KEYSER, United States Air Force, 93rd Maintenance Squadron, Robins Air Force Base,

Georgia, did, at Robins Air Force Base, Georgia, on or about 16 April 1999, knowingly receive child pornography ~~that had been mailed, shipped, or transported in interstate or foreign commerce by any means including computer, in violation of Title 18, United States Code, § 2252(a)(2)(A)~~.

The decision of the United States Air Force Court of Criminal Appeals is affirmed as to the Charge and specification 1 as amended, as well as to the sentence.

Appendix B

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant DALE P. KEYSER,
United States Air Force

ACM 34252

November 28, 2001

Sentence adjudged 2 August 2000 by GCM convened at Robins Air Force Base, Georgia. Military Judge: Israel B. Willner (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 8 months, forfeiture of all pay and allowances, and reduction to E-1.

For Appellant: *Colonel James R. Wise, Lieutenant Colonel Timothy W. Murphy, and Captain Patrick J. Dolan.*

For the United States: *Colonel Anthony P. Dattilo and Major Lance B. Sigmon.*

Before

SCHLEGEL, ROBERTS, and PECINOVSKY,
Appellate Military Judges

OPINION OF THE COURT

PECINOVSKY, Judge:

Appellant was convicted, pursuant to his plea, of receiving child pornography through interstate commerce in violation of 18 U.S.C. § 2252A(a)(2)(A) and Article 134, UCMJ, 10 U.S.C. § 934. He was sentenced to a bad-conduct discharge, confinement for 8 months, reduction to E-1, and forfeiture of all pay and allowances. The appellant argues that: 1) His plea was improvident because he did not admit to sufficient facts to establish the images actually traveled in interstate commerce; and 2) His sentence was too severe. We hold that his plea was provident and that his sentence was appropriate, and we affirm.

I. Providency of the Plea

The standard of review for determining whether a guilty plea is provident is whether an accused can "show a 'substantial basis' in law and fact" exists for overturning the guilty plea. *United States v. James*, 55 M.J. 297, 298 (2001) (quoting *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)); *United States v. Faircloth*, 45 M.J. 172, 174 (1996). In *Faircloth*, our superior court adopted the language of Senior Judge Pearson, concurring in part and dissenting in part, in one of this Court's decisions: "This is a guilty plea, folks. . . . By pleading guilty, appellant knowingly waived a trial of the facts." *Id.* at 174 (citing *United States v. Faircloth*, 43 M.J. 711, 718 (A.F. Ct. Crim. App. 1995)). Where an appellant pleads guilty, the issue must be analyzed in terms of providence of his plea, not sufficiency of the evidence. *Faircloth,* 45 M.J. at 174. Once accepted as provident, a guilty plea should be set aside on appeal only if the record fails to support the plea or contains "evidence 'in substantial conflict' with" the guilty plea. *United States v. Shearer*, 44 M.J. 330, 334 (1996) (quoting *United States v. Higgins,* 40 M.J. 67, 68 (C.M.A. 1994)). In determining the providency of the plea, we view the evidence in the light

most favorable to the prosecution. *United States v. Ozores,* 53 M.J. 670, 673 (A.F. Ct. Crim. App. 2000) (citing *United States v. Hubbard,* 28 M.J. 203, 209 (C.M.A. 1989) (Cox, J., concurring)).

Here, the appellant pled guilty to the knowing receipt of child pornography in violation of 18 U.S.C. § 2252A(a)(2)(A). During the providence inquiry, the military judge questioned the appellant concerning his use of the Internet and the receipt of the images through interstate commerce:

> MJ: As I mentioned to you before that under this offense, the pornography must have been mailed, shipped, or transported in interstate or foreign commerce, including by computer. You mentioned that you downloaded this from your computer and I believe you described for me that you received via the Internet. Is that correct?
>
> ACC: Yes, sir.
>
> MJ: And based on your discussion with your counsel or anything else that you've learned or that you know about the Internet, are you satisfied that the Internet is a means of interstate commerce?
>
> ACC: Yes, sir.
>
> MJ: And also there's a particular federal statute described that you are alleged to have violated and that's the statute I read to you before that's listed within the Specification. Now, based on everything that you've learned, either from working with your counsel or any other research that you've done, looking through the evidence

in your case, are you satisfied that your conduct violated the specific statutory cite listed within Specification 1 of the Charge?

ACC: Yes, sir.

MJ: You are satisfied that your conduct violated that federal statute?

ACC: Yes, sir.

The appellant now alleges that the military judge did not elicit sufficient facts to establish that appellant received images through interstate commerce in violation of 18 U.S.C. § 2252A(a)(2)(A). Appellant takes issue with the fact that the military judge did not define "interstate or foreign commerce" and argues that it is possible that the images he allegedly received only traveled in intrastate commerce.

Recent decisions by this Court and our superior court address, but do not resolve, this issue concerning the use of the Internet and interstate commerce. In *United States v. Murray*, 52 M.J. 423, 426 (2000), a non-guilty plea case, our superior court held that a prosecution for violation of 18 U.S.C. § 2252A(a)(2) does not require proof that an appellant had knowledge that the material was transported through interstate commerce. In *Murray*, testimony from the owner of the Internet service provider (ISP), used by the appellant in that case, established that the ISP received its images from outside of the state where the appellant downloaded images of child pornography. 52 M.J. at 426. Therefore, the government did prove that the images actually traveled through interstate commerce.

In an unpublished opinion, a panel of this Court relied upon *Murray* for the proposition that "receipt of images via the Internet constitutes transportation in interstate commerce." *United States v. Croston*, ACM 33774 (A.F. Ct. Crim. App. 26 Mar 2001). However, *Murray* does not stand

for the proposition that downloading an image from the Internet establishes per se that the image traveled through interstate commerce. In *Murray*, independent evidence of interstate commerce was admitted into evidence.

Similarly, in *United States v. Gallo*, 53 M.J. 556, 565 (A.F. Ct. Crim. App. 2000), the issue of use of the Internet and travel through interstate commerce was resolved on an evidentiary basis. In *Gallo*, evidence was admitted that the appellant had accessed Internet addresses in states other than the state in which he and his computer were located. *Id.* There, out-of-state addresses were connected to text files, and "upload logs" demonstrated that child pornography was both received and transmitted via the Internet and appellant's computer. *Id.*

Here, there was no independent evidence that appellant received the images through interstate or foreign travel. Although the evidence contains Internet addresses associated with the images of child pornography, this evidence does not clearly indicate the images traveled through interstate commerce. However, this is a guilty plea case. The appellant admitted in the providence inquiry that the images were downloaded from the Internet, a means of interstate commerce. He further admitted that he violated the federal statute, requiring receipt of pornography through interstate or foreign commerce. The fact that the images he downloaded from the Internet could have come from intrastate commerce, does not constitute evidence in the record "in substantial conflict" with his guilty plea. *See Shearer,* 44 M.J. at 334. Viewing the evidence in the light most favorable to the prosecution, we find the plea provident as to the element of interstate commerce. *See Ozores*, 53 M.J. at 673.

Even if the providence inquiry had not established sufficient facts to establish that the appellant received images through interstate commerce in violation of 18 U.S.C. § 2252A(a)(2)(A), the absence of such facts is not fatal to appellant's conviction. In *United States v. Sapp,* 53 M.J. 90

(2000) and *United States v. Augustine*, 53 M.J. 95 (2000), our superior court affirmed child pornography convictions under Article 134, UCMJ, absent the violation of a federal child pornography statute. In *Sapp*, the appellant was charged with violation of 18 U.S.C. § 2252(a)(4)(A) for possession of three or more matters containing child pornography. *Sapp,* 53 M.J. at 91. During the providence inquiry, the appellant admitted to possession of three or more images contained on a single computer disc. *Id.* Upon appeal to this Court, we held that the military judge failed to properly explain all of the elements required for a violation of the federal statute, that being three or more "matters." *Id.* However, we then affirmed the conviction of a lesser-included offense and modified the specification to possession of three or more images of child pornography. *Id.* Our superior court affirmed this conviction, holding, "We have no doubt that the knowing possession of images depicting sexually explicit conduct by minors, when determined to be service-discrediting conduct, is a violation of Article 134." *Id. at 92.* Following the decision in *Sapp*, our superior court affirmed the child pornography conviction in *Augustine* of a lesser-included offense of possession of three or more images of child pornography in violation of Article 134, UCMJ, and modified the specification, accordingly. *Augustine,* 53 M.J. at 96.

Here, as in *Sapp* and *Augustine*, the appellant admitted that the charged offenses were service-discrediting. *See Sapp,* 53 M.J. at 92; *Augustine,* 53 M.J. at 96. Therefore, appellant's receipt of child pornography constituted a violation of Article 134, UCMJ, even absent proof of receipt of the images through interstate commerce as required by the federal statute, 18 U.S.C. § 2252A(a)(2)(A). *See Sapp*, 53 M.J. at 92; *Augustine,* 53 M.J. at 96.

II. Sentence Severity

The appellant argues that his sentence was too severe. We may affirm only such part or amount of the sentence as

we find correct in law and fact and determine, on the basis of the entire record, should be approved. Article 66(c), UCMJ, 10 U.S.C. § 866(c). We are to ensure "that justice is done and that the accused gets the punishment he deserves." *United States v. Healy,* 26 M.J. 394, 395 (C.M.A. 1988). *We accomplish this by "giving individualized consideration to the nature and seriousness of the offenses and the character of the offender." United States v. Sanchez,* 50 M.J. 506, 512 (A.F. Ct. Crim. App. 1999) (citing *United States v. Snelling,* 14 M.J. 267, 268 (C.M.A. 1982)).

The appellant was convicted of the receipt of child pornography. This was not a case in which any doubt existed as to whether the pornography consisted of images of underage children. See United States v. Shipe, ACM 34013 (A.F. Ct. Crim. App. 19 Jul 2001). Here, appellant admitted that the child pornography consisted of images of young girls between the ages of 12 and 14. We have reviewed these images and it is clear to us that these were young girls. A compelling governmental interest exists in preventing the social ills posed by the receipt and possession of child pornography. *See James,* 55 M.J. at 299-300 (adopting the rationale in *United States v. Hilton,* 167 F.3d 61 (1st Cir. 1999). In examining the nature and seriousness of the offense of receipt of child pornography, we hold that the approved sentence is appropriate. *See Healy,* 26 M.J. at 395; *Snelling,* 14 M.J. at 268.

The findings are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Accordingly, the findings and sentence are: AFFIRMED.

Appendix C

UNITED STATES, Appellee

v.

Barry O'CONNOR, Senior Airman,
U.S. Air Force, Appellant

No. 01-0403

Crim. App. No. 33671

United States Court of Appeals for the Armed Forces

Argued February 25, 2003

Decided July 9, 2003

ERDMANN, J., delivered the opinion of the Court, in which GIERKE, EFFRON, and BAKER, JJ., joined. CRAWFORD, C.J., filed a separate dissenting opinion.

Counsel

For Appellant: *Major Jefferson B. Brown (argued); Colonel Beverly B. Knott, Major Terry L. McElyea, and Captain Kyle R. Jacobson (on brief); Colonel James R. Wise and Lieutenant Colonel Timothy W. Murphy.*

For Appellee: *Captain C. Taylor Smith (argued); Lieutenant Colonel Lance B. Sigmon and Lieutenant Colonel LeEllen Coacher (on brief); Major Linette I. Romer.*

Amicus Curiae: *Nita Farahany (law student)(argued); James Coleman, Esq. (supervising attorney), and Randall Cook (law student)(on brief)-For the Duke University School of Law.*

Military Judge: *Bruce T. Brown*

Judge ERDMANN delivered the opinion of the Court.

Appellant, Senior Airman Barry O'Connor, United States Air Force, was tried by general court-martial at Hurlburt Field, Florida. Pursuant to his pleas, he was convicted of two specifications of forcible sodomy of a female under 16 years of age and four specifications of indecent acts or indecent liberties with the same victim, in violation of Articles 125 and 134, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § § 925 and 934 (2000). Also pursuant to his pleas, he was convicted of one specification of obstructing justice and two specifications of receiving and possessing child pornography, all violations of Article 134.

The military judge sentenced Appellant to a dishonorable discharge, sixteen years' confinement and reduction to E-1. Consistent with a pretrial agreement, the convening authority reduced the confinement to twelve years and approved the balance of the sentence. On January 25, 2001, the Air Force Court of Criminal Appeals affirmed the findings and sentence in an unpublished opinion.

On July 19, 2001, we granted Appellant's petition for review on the following issue:

> WHETHER APPELLANT'S CONVICTIONS UNDER SPECIFICATIONS 2 AND 3 OF ADDITIONAL CHARGE II MUST BE SET ASIDE BECAUSE THE DEFINITIONS OF CHILD PORNOGRAPHY USED TO SUPPORT THOSE CONVICTIONS ARE

UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

On September 6, 2001, we issued an order summarily affirming Appellant's conviction and sentence in light of our decision in *United States v. James*, 55 M.J. 297 (C.A.A.F. 2001). In James, we upheld the constitutionality of the definition of child pornography upon which Appellant's conviction was based, a view consistent with the majority of other federal courts of appeals that had considered the issue. 55 M.J. at 299.

Appellant then sought review of his child pornography conviction by the Supreme Court. On April 22, 2002, the Supreme Court granted Appellant's petition for writ of certiorari, vacated our earlier judgment and remanded it to us for further consideration in light of its decision in *Ashcroft v. Free Speech Coalition,* 535 U.S. 234 (2002).

This matter is before us again because the Supreme Court determined that certain portions of the federal statute underlying Appellant's conviction are unconstitutional. On August 20, 2002, we ordered the parties to submit supplemental briefs on the following issue:[1]

WHETHER THE FINDINGS OF GUILTY OF SPECIFICATIONS 2 AND 3 OF ADDITIONAL CHARGE II CAN BE AFFIRMED IN LIGHT OF *ASHCROFT V. FREE SPEECH COALITION.*

For the reasons set forth below, we set aside the findings of guilty to Specifications 2 and 3 of Additional Charge II and remand Appellant's case for appropriate action.

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[1] Argument was heard in this case at the Duke University School of Law, Durham, North Carolina, as part of this Court's Project Outreach. *See United States v. Mahoney*, 58 M.J. 346, 347 n.1 (2003).

Background

In connection with their investigation of the other charges in this matter, agents of the Air Force Office of Special Investigations secured various items of computer media belonging to Appellant. Analysis by the Department of Defense Forensic Laboratory disclosed over 6,500 files of suspected child pornographic images contained on that media, many of which were duplicates.

Further analysis of the computer media disclosed numerous instances where Appellant's computer had downloaded suspected child pornographic images from the Internet and several instances where it had posted such images to the Internet. Appellant explained that he had taken certain steps to set up a file exchange structure through the Internet that allowed his computer to receive and download the images. Samples of the images (approximately fifty-nine) were admitted into evidence in accordance with Appellant's stipulation of fact. Appellant's receipt and possession of the images described above formed the basis for his conviction under specifications 2 and 3 of Additional Charge II, which alleges a violation of Article 134.

Conduct is punishable under Article 134 if it prejudices "good order and discipline in the armed forces" [clause 1], if it is "of a nature to bring discredit upon the armed forces" [clause 2], or if it is a crime or offense not capital [clause 3]. The three clauses do not create separate offenses, but rather provide alternative ways of proving the criminal nature of the charged misconduct. *United States v.* Sapp, 53 M.J. 90, 92 (C.A.A.F. 2002).

In this case, Appellant's possession and receipt of child pornographic images was charged as a "clause 3" offense under Article 134, with the "crime or offense not capital" being a violation of the Child Pornography Prevention Act of 1996 (CPPA), 18 U.S.C. § § 2251-2260 (2000). In other

words, it was the alleged violation of that federal law that gave rise to the Article 134 charge.

The CPPA prohibits, inter alia, the knowing receipt and knowing possession of child pornography that has been transported in interstate or foreign commerce, including by computer. *See* 18 U.S.C. § § 2252A(a)(2)(A), (a)(5)(B). The term "child pornography" for purposes of those offenses is defined in 18 U.S.C. § 2256(8) as follows:

> any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where --
>
> (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
>
> (B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct;
>
> (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or
>
> (D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.

In *Free Speech Coalition*, the Supreme Court determined that certain portions of the § 2256(8) definition are unconstitutional, specifically the "or appears to be" language of § 2256(8)(B), and the entirety of § 2256(8)(D). 535 U.S.

at 256, 258.[2] In striking the former, the Court specifically discussed the distinction between "virtual" child pornography and "actual" pornography and concluded that the rationales for restricting pornographic materials involving actual children do not extend to computer-generated simulations or images. *Id.* at 249-56.

The Supreme Court concluded that the First Amendment prohibits any prosecution under the CPPA based on "virtual" child pornography. We must now determine whether Appellant's conviction for possessing and receiving child pornography can be sustained in light of that ruling.

Discussion

A. The Providence of Appellant's Plea under Article 134, Clause 3.

Appellant's conviction is based on his plea of guilty to violating those portions of the CPPA prohibiting the knowing receipt and possession of child pornography that has been transported in interstate or foreign commerce, including by computer. *See* 18 U.S.C. § 2252A(a)(2)(A), (a)(5)(B). For us to set aside a finding based upon a guilty plea on appellate review, the record of trial must show a substantial basis in law and fact for questioning the guilty plea. *United States v.* Jordan, 57 M.J. 236, 238 (C.A.A.F. 2002) (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). The inquiry, then, is whether the Supreme Court's decision in *Free Speech Coalition* creates a

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[2] The Supreme Court did not consider the 18 U.S.C. § 2256(8)(C) (2000) definition, which it described as "computer morphing" -- a process where innocent pictures of real children are altered so that the children appear to be engaged in sexual activity. This form of "child pornography" remains subject to criminal sanction. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 242 (2002).

substantial basis in law and fact for questioning Appellant's plea. We conclude that it does.

For a guilty plea to be provident, the accused must be convinced of, and be able to describe, all of the facts necessary to establish guilt. Rule for Courts-Martial 910(e) discussion. In order to establish an adequate factual predicate for a guilty plea, the military judge must elicit "factual circumstances as revealed by the accused himself [that] objectively support that plea[.]" *Jordan*, 57 M.J. at 238 (quoting *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996)).

Prior to *Free Speech Coalition*, knowing possession and receipt of images of child pornography, virtual or actual, was sufficient to establish one of the factual predicates for a plea of guilty under the CPPA. The "virtual" or "actual" character of the images was not, in and of itself, a factual predicate to a guilty plea -- criminal liability could arise under either circumstance.

It is no longer enough, however, to knowingly possess, receive or distribute visual depictions that "appear to be" of a minor engaging in sexually explicit conduct. In the wake of Free Speech Coalition, the relevant provisions of 18 U.S.C. § 2256(8) require that the visual depiction be of an actual minor engaging in sexually explicit conduct. The "actual" character of the visual depictions is now a factual predicate to any plea of guilty under the CPPA.

In order to find Appellant's plea provident, his plea inquiry and the balance of the record must objectively support the existence of this factual predicate. We conclude that they do not. During his providence inquiry, the military judge utilized the pre-Free Speech Coalition provisions of 18 U.S.C. § 2256(8) to explain the definition of "child pornography" to Appellant. When asked after that explanation to describe why he believed the materials at issue were "child pornography," Appellant indicated that "the occupants in the pictures appeared to be under the age of

18." (Emphasis added.) It was against that backdrop that Appellant made his subsequent acknowledgements and admissions concerning his possession and receipt of "child pornography."

The military judge's use of the pre-*Free Speech Coalition* definition of "child pornography" properly reflected the law at the time of trial. His failure to inquire into the "actual" versus "virtual" distinction was perfectly understandable --it had no factual significance to the offenses under the law as it stood at that time. As outlined above, however, it now has critical significance. Through no fault of the military judge or the parties, the record before us contains no discussion or acknowledgement on the part of Appellant (or anyone) concerning the now-critical distinction between actual and virtual images.

In *James*, we held that the CPPA definitions were constitutional but acknowledged in dicta that, even if the CPPA were narrowly construed to exclude "virtual" images, the record and providence inquiry in that particular case "'objectively supported' appellant's guilty pleas to possessing and transporting child pornography depicting actual minors." 55 M.J. at 301. Our analysis of this issue, however, is now shaped by the landscape created by the Supreme Court in *Free Speech Coalition*. The most prominent feature of that landscape is the distinction between "actual" and "virtual" images, and it is unclear from the providence inquiry and record here whether Appellant was pleading guilty to possession of virtual or actual child pornography.

Congress has recently taken action in response to the Supreme Court's decision in *Free Speech Coalition* by including a category of "virtually indistinguishable" images in the CPPA definitions. *See* Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, § 502, 117 Stat. 650, 678-679

(2003).[3] The effect and constitutionality of that recent action remain to be assessed in future cases.

For present purposes, however, a provident guilty plea to a violation of the CPPA provisions at issue here must reflect that an accused has violated those portions of the statute upheld by the Supreme Court. In light of that, and in the absence of any discussion or focus in the record before us regarding the "actual" character of the images, we cannot view Appellant's plea of guilty to violations of the CPPA as provident.

B. The Providence of Appellant's Plea under Article 134, Clause 2.

Our determination that Appellant's plea is improvident as to a violation of the CPPA does not end our inquiry. We have recognized in the past that an improvident plea to a CPPA-based clause 3 offense under Article 134 may be upheld as a provident plea to a lesser-included offense under clause 2 of Article 134. *See e.g., United States v. Augustine,* 53 M.J. 95 (C.A.A.F. 2000); *Sapp,* 53 M.J. at 92.

As in this case, the guilty pleas in Sapp and Augustine were entered to a violation of Article 134, clause 3, based on possession of child pornography in violation of the CPPA. As in this case, the guilty pleas were found to be improvident as to the clause 3 offense in light of certain requirements under the CPPA that were not established in the record. In those cases, however, we concluded that the guilty pleas were provident as to the lesser-included offense of engaging in "conduct of a nature to bring discredit upon the armed

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[3] That action was motivated by Congress' recognition of the practical consequences flowing from the distinction drawn by the Supreme Court. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, § 501, 117 Stat. 676-678 (congressional findings regarding state of technology and difficulty in distinguishing virtual from actual images).

forces" under clause 2 and upheld the convictions under Article 134. *Augustine*, 53 M.J. at 96; *Sapp*, 53 M.J. at 92.

The question before this Court is whether that same conclusion can be reached here. For the reasons outlined below, we conclude that it cannot. Both *Sapp* and *Augustine* involved discussions between the accused and the military judge during the providence inquiry concerning the service-discrediting character of their actions in possessing images of child pornography. *Sapp,* 53 M.J. at 91 (accused admitted during providence inquiry that possession of images constituted service-discrediting conduct); *Augustine*, 53 M.J. at 96 (accused admitted during providence inquiry that his conduct "was of a nature to bring discredit upon the armed forces).

Although Appellant stipulated to the service-discrediting character of his conduct in the present case there was no discussion of that element by either Appellant or the military judge during his plea inquiry. It is the absence of any discussion of the service-discrediting character of Appellant's conduct during the providence inquiry coupled with the impact of the Supreme Court's decision in *Free Speech Coalition* that gives us pause. The Supreme Court has now extended a cloak of First Amendment protection to certain depictions of minors engaging in sexually explicit conduct. Accordingly, the question of whether or not the possession of such visual depictions can be viewed as service discrediting now has a constitutional dimension that was not at issue in *Sapp* or *Augustine.*

Essential to our holding in *Sapp* was the recognition that the providence inquiry there demonstrated that the accused "clearly understood the nature of the prohibited conduct." 53 M.J. at 92. In the wake of *Free Speech Coalition,* the "virtual" or "actual" status of the images at issue has constitutional significance. That constitutional significance may, in turn, bear on "the nature of the prohibited conduct", i.e., its service-discrediting character.

Appellant's plea inquiry was focused on the question of whether or not his conduct violated the CPPA, not the question of whether or not, under the circumstances, his conduct was of a nature to bring discredit upon the armed forces. As such, there was no specific discussion with Appellant concerning the service-discrediting character of his conduct, much less any constitutional implications his conduct may or may not have had.

In the absence of any conscious discussion regarding those issues, the record here does not demonstrate that Appellant "clearly understood the nature of the prohibited conduct." *See id.* Accordingly, we cannot view Appellant's plea as provident to the lesser-included offense of service-discrediting conduct under clause 2 of Article 134.

That same absence of focus in the record also prevents us from engaging in any broad inquiry concerning the degree to which the First Amendment protections extended to virtual images by the Supreme Court carry over into the realm of military justice. Accordingly, we do not address the question of whether, in the wake of *Free Speech Coalition*, the possession, receipt or distribution of images of minors engaging in sexually explicit conduct (regardless of their status as "actual" or "virtual") can constitute conduct of a nature to bring discredit upon the armed forces for purposes of clause 2 of Article 134.

We have long recognized that the First Amendment rights of civilians and members of the armed forces are not necessarily coextensive. *United States v. Brown,* 45 M.J. 389, 396 (C.A.A.F. 1996). At the same time, however, we must ensure that the connection between any conduct protected by the First Amendment and its effect in the military environment be closely examined. *Id.* The absence of any discussion in Appellant's plea inquiry or any other record development concerning the service-discrediting

character of his conduct precludes us from engaging in that "close examination" in the present case.

Conclusion

The decision of the United States Air Force Court of Criminal Appeals is reversed as to Specifications 2 and 3 of Additional Charge II and as to sentence, but is affirmed in all other respects. The findings of guilty of Specifications 2 and 3 of Additional Charge II and the sentence are set aside. The record of trial is returned to the Judge Advocate General of the Air Force for remand to the Court of Criminal Appeals. That court may either dismiss Specifications 2 and 3 of Additional Charge II and reassess the sentence, or it may order a rehearing. Thereafter, Article 67, UCMJ, 10 U.S.C. § 867 (2000) will apply.

CRAWFORD, Chief Judge (dissenting):

I would affirm the decision of the court below on several grounds. First, Appellant waived the issue by failing to challenge the constitutionality of the statute at trial. Second, the factual circumstances of the record objectively support Appellant's guilty plea to possessing and transporting child pornography depicting actual minors. Moreover, Appellant's guilty plea to Additional Charge II, Specifications 2 and 3, was provident to the lesser-included offense of conduct prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces. For these reasons, I respectfully dissent.

A. Appellant Waived the Issue.

"A criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution." *United States v. Mezzanatto*, 513 U.S. 197, 201 (1995). In fact, "that constitutional questions which are nonjurisdictional must be asserted at trial to preserve them for appeal is a well settled doctrine[.]" *United States v.*

Hoskins, 406 F.2d 72, 74 (7th Cir. 1969) (citing *Head v. New Mexico Board,* 374 U.S. 424, 432 n.12 (1963); *Glidden Co. v. Zdanok,* 370 U.S. 530 (1962); *Wong Tai v. United States,* 273 U.S. 77 (1927); *Cox v. City of Freeman,* 321 F.2d 887 (8th Cir. 1963); *Werner v. Hearst Publishing Co.*, 297 F.2d 145 (9th Cir. 1961); *Rubin v. United States*, 289 F.2d 195 (5th Cir. 1961); *Evangelical Lutheran Church v. Stanolind Oil & Gas Co.*, 251 F.2d 412 (8th Cir. 1958); *Keyes v. Madsen,* 179 F.2d 40 (D.C. Cir. 1949), *cert. denied*, 339 U.S. 928 (1950); *Wabash Ry. Co. v. City of St. Louis*, 64 F.2d 921 (8th Cir. 1933)). Moreover, "the rule is well established and of long standing that an exception [to a charge], to be of any avail, must be taken at the trial." *Johnson v. Garber*, 73 F. 523, 526 (6th Cir. 1896)(quoting *United States v. Carey*, 110 U.S. 51, 52 (1884)).

When Appellant learned of his charge under Article 134, clause [3], for violating the Child Pornography Prevention Act (CPPA), 18 U.S.C. § 2252A (2000), he neither took exception to the charge generally, nor alleged that the basis for the charge - - the CPPA -- was unconstitutionally vague and overbroad. In so doing, Appellant cannot now be afforded relief on the very grounds he himself failed to raise, and therefore waived.

B. The Record Supports Appellant's Guilty Plea to Possessing and Transporting Child Pornography Depicting Actual Minors.

Even if waiver is not applicable, Appellant's guilty plea was provident to violating the CPPA, as interpreted by the Supreme Court in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

In *Free Speech Coalition*, the Court in effect held that to violate the CPPA, one must knowingly receive and possess child pornography, transported in interstate or foreign commerce, where such pornography is comprised of visual depictions of actual minors. Thus, the accused's knowledge that the pornography involves actual minors is an element of

the offense that must be established. In a contested case, the Government must demonstrate this knowledge beyond a reasonable doubt to prove the accused committed the crime. In a non-contested case, such as this one, the court must only verify this knowledge to sustain the providence of the guilty plea.

When evaluating the providence of a guilty plea, "rather than focusing on a technical listing of the elements of an offense, this Court looks at the context of the entire record to determine whether an accused is aware of the elements, either explicitly or inferentially." *United States v. Redlinski,* 58 M.J. 117, 119 (C.A.A.F. 2002) (emphasis added). "There need only be 'factual circumstances' on the record 'which "objectively" support' the guilty pleas, i.e., that actual minors were in appellant's pictures." *United States v. James*, 55 M.J. 297, 300 (C.A.A.F. 2001)(quoting *United States v. Shearer,* 44 M.J. 330, 334 (C.A.A.F. 1996)).

In James, this Court considered the following colloquy in evaluating the providence of the appellant's guilty plea to violating the pre-*Free Speech Coalition* CPPA:

> Q. The term "child pornography" [under the CPPA] means any visual depiction . . . involving the use of a minor engaging in sexual [sic] explicit conduct. Such visual depiction is or appears to be of a minor engaging in sexually explicit conduct[.]
>
> . . . .
>
> Q. Now, why do you believe that - as far as describes those files - why you believe the files to be described as child pornography?
>
> A. Well, they depicted young females under the age of eighteen, which as you stated, that they,

> uh, they are minors. I believe that the pictures depicted minors under the age of eighteen and at least four contained minors engaged in sexual activity.
>
> . . . .
>
> Q. Do you believe that one of those persons involved in that conduct was a minor?
>
> A. I believe the person in the picture was under eighteen, yes, sir.

55 M.J. at 299, 301 (emphasis added). The Court noted that through these words, the appellant "admitted that actual minors were in the charged pictures" and that these admissions were "amply supported by the pictures themselves." *Id.* at 300-01. The Court then concluded that "the factual circumstances reflected in the record 'objectively support' [the] appellant's guilty pleas to possessing and transporting child pornography depicting actual minors." *Id.* at 301 (emphasis added). In short, although the appellant did not supply the adjectives "real" or "actual," and although the judge defined "pornography" in pre-*Free Speech Coalition* terms, this Court inferred from the language the appellant did use -- "young females" and "minors" -- that the images involved actual minors. See *Redlinski*, 58 M.J. at 119 (noting that providence may be confirmed by the record inferentially).

In the present case, when the military judge questioned Appellant regarding the exact act he committed, the following exchange occurred:

> Q. So you did in fact receive child pornography through your computer?
>
> A. Yes, sir, I did.
>
> Q. How did you know that?

A. Some of it was very obvious, Your Honor.

Q. Can you explain how it was very obvious?

A. Young, undeveloped, female children.

Q. How were they depicted?

A. Posing, engaged in sexual acts of intercourse and sodomy.

(Emphasis added.)

The descriptive terminology Appellant used -- that those depicted were "young, undeveloped, female children" -- was very similar to the terminology in James, particularly given the near equivalency in meaning of the words "minor" and "child." *See* Black's Law Dictionary 1011 (7th ed. 1999)(defining "minor" as "[a] person who has not reached full legal age; a child or juvenile")(emphasis added). Moreover, as in *James*, the pictures attached to the record in this case amply support Appellant's awareness that the images involved actual minors.

Finally, the Department of Defense Forensic Laboratory uncovered over 6,500 files of child pornography on Appellant's computer, approximately 59 of which were admitted into evidence. Given the staggering number of files, probability and common sense certainly dictate that among those files were at least three images of actual children. *See* 18 U.S.C. § 2252A(d) (2000) (noting that liability requires possession of at least three proscribed images). Thus, this Court should infer from the record Appellant's knowledge that at least three of the images were of actual children. See *Redlinski*, 58 M.J. at 119; *United States v. Blocker*, 32 M.J. 281, 284 (C.M.A. 1991) (noting that in resolving many questions courts may draw reasonable inferences from the evidence of record).

In short, the factual circumstances of the record objectively support Appellant's guilty plea to possessing and transporting child pornography depicting actual minors.

C. Appellant's Plea was also Provident to the Lesser-Included Offense of Conduct Prejudicial to Good Order and Discipline or of a Nature to Bring Discredit Upon the Armed Forces.

Notwithstanding the providence of Appellant's guilty plea to possessing and transporting child pornography depicting actual minors, in violation of the CPPA, the same plea was provident to the lesser-included offense of conduct prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces.

Article 134, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 934 (2000), punishes

> [1] all disorders and neglects to the prejudice of good order and discipline in the armed forces, [2] all conduct of a nature to bring discredit upon the armed forces, and [3] crimes and offenses not capital, of which persons subject to this chapter may be guilty[.]

In *United States v. Foster,* 40 M.J. 140, 143 (C.M.A. 1994), this Court held that each offense charged under the UCMJ "per se is either prejudicial to good order and discipline or brings discredit to the armed forces." Thus, conduct violating any enumerated Article, or *Article 134*, clause [3], per se also violates *Article 134*, clause [1] or clause [2]. *United States v. Sapp,* 53 M.J. 90, 92 (C.A.A.F. 2000). Accordingly, an accused charged under Article 134, clause [3], is on notice that Article 134, clause [1] or clause [2], is a lesser-included offense of the principal clause [3] charge. *Id.* In short, included within Appellant's charge under Article 134, clause [3], was the lesser-included offense of conduct prejudicial to good order and discipline or of a nature to bring discredit

upon the armed forces, under Article 134, clauses [1] and [2]. This Court may therefore affirm so much of the finding as includes this lesser-included offense. Article 59(b), UCMJ, 10 U.S.C. § 859(b) (2002) ("Any reviewing authority with the power to approve or affirm a finding of guilty may approve or affirm, instead, so much of the finding as includes a lesser included offense.").

In evaluating the providence of Appellant's guilty plea to this lesser-included offense, "this Court looks at the context of the entire record to determine whether [Appellant was] aware of the elements, either explicitly or inferentially." *Redlinski,* 58 M.J. at 119 (emphasis added). Such awareness "may be satisfied by the 'factual statement,' the 'stipulation,' or 'representation' by counsel that the offense was committed." *Id. at 120* (Crawford, C.J., dissenting)(quoting *Henderson v. Morgan*, 426 U.S. 637, 646 (1976)) (emphasis added).

Appellant's ten page stipulation of fact contains 33 paragraphs and hyperlinks to each of the 6,508 image files that resulted in Appellant's charge under Article 134. Four times in the stipulation, Appellant acknowledged that knowingly downloading and electronically storing these very images was conduct "to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces." This admission is binding as fact upon the parties and the court-martial, unless and until it is withdrawn or stricken from the record. *United States v. Gerlach,* 37 C.M.R. 3, 5 (1966); Rule for Courts-Martial 811(e). In short, Appellant's explicit admissions, coupled with the detailed descriptions and hyperlink references, objectively support his guilty plea to the lesser-included offense of conduct prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces.

The majority is troubled by "the absence of any discussion of the service-discrediting character of Appellant's conduct during the providence inquiry coupled with the impact of the Supreme Court's decision *in Free Speech Coalition*[.]" __ M.J. at (10). While these factors initially gave me pause as well, after much reflection, I am even more convinced of the providence of Appellant's guilty plea to the lesser-included offense.

First, because Appellant stipulated that his conduct was prejudicial to good order and discipline and of a nature to bring discredit upon the armed forces, and because the court-martial is bound by that stipulation, the lack of a discussion during the providence inquiry of the prejudicial and service-discrediting character of Appellant's conduct does not preclude a finding that the plea was provident. The stipulation alone, which was neither withdrawn nor stricken from the record, left no doubt that Appellant fully and intelligently understood his conduct to be prejudicial to good order and discipline and of a nature to bring discredit upon the armed forces. *See Henderson v. Morgan*, 426 U.S. at 646 (acknowledging that a stipulation "can serve as a substitute for either a finding after trial, or a voluntary admission, that [an appellant] had the requisite [mental state]").

Moreover, the Supreme Court's decision in *Free Speech Coalition* impacts only the providence of Appellant's plea to the violation of Article 134, clause [3], which refers to Appellant's violation of the CPPA. The providence of Appellant's admission to violating the CPPA is distinct from the providence of his admission to conduct prejudicial to good order and discipline and of a nature to bring discredit upon the armed forces. Certainly, knowing possession of images such as those that formed the basis of Appellant's conviction -- whether the minors depicted in the images are actual minors or merely "virtual" minors -- is to the prejudice of good order and discipline, as well as service-discrediting.

See Manual for Courts-Martial, United States (2002 ed.) Part IV, para. 60.c.(2) - (3). Thus, notwithstanding Free Speech Coalition, Appellant's plea remains provident for the lesser-included offense of conduct prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces. As evidenced by the stipulation, Appellant clearly understood that what he did was prejudicial to good order and discipline, as well as service-discrediting, regardless of whether he clearly understood that the images were of actual children.

In sum, Appellant's plea supports the charge and specification of possessing and transporting child pornography depicting actual minors. Moreover, the plea supports at least a finding of guilty as to the lesser-included offense.

For these reasons, I respectfully dissent from the majority opinion.

Appendix D

UNITED STATES, Appellee

v.

Robert L. MASON, Jr., Major, U.S. Air Force, Appellant

No. 02-0849

Crim. App. No. 34394

United States Court of Appeals for the Armed Forces

Argued March 2, 2004

Decided June 10, 2004

ERDMANN, J., delivered the opinion of the Court, in which GIERKE, EFFRON, and BAKER, JJ., joined. CRAWFORD, C.J., filed a separate opinion concurring in the result.

Counsel

For Appellant: *Major Rachel E. Vanlandingham (argued); Colonel Beverly B. Knott, Major Terry L. McElyea, and Captain Jennifer K. Martwick (on brief).*

For Appellee: *Major Shannon J. Kennedy (argued); Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs,*

Lieutenant Colonel Lance B. Sigmon, and Captain Lane A. Thurgood (on brief).

Military Judge: *Thomas G. Crossan, Jr.*

Judge ERDMANN delivered the opinion of the Court.

Major Robert L. Mason, Jr., entered guilty pleas and was convicted by a general court-martial of violating a lawful general order, engaging in conduct unbecoming an officer and a gentleman and knowingly receiving child pornography in violation of Articles 92, 133 and 134, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § § 892, 933 and 934 (2000), respectively. He was sentenced by the military judge to a dismissal, confinement for two years and forfeiture of all pay and allowances. In accordance with the terms of a pretrial agreement, the convening authority approved only so much of the sentence as provided for dismissal and six months' confinement.

Mason assigned several errors in his appeal to the Air Force Court of Criminal Appeals, including a claim that his guilty plea to the Article 134 charge was improvident in light of the Supreme Court's decision in *Ashcroft v. Free Speech Coalition,* 535 U.S. 234 (2002). The Court of Criminal Appeals reviewed Mason's claims, rejected all of them and affirmed his conviction and sentence.

Mason petitioned this Court for review of the Court of Criminal Appeals' decision and we granted review of the following assigned Issue I and specified review of Issue II:

> I. WHETHER APPELLANT'S PLEAS OF GUILTY TO OFFENSES UNDER 18 U.S.C. SECTION 2252A WERE INVOLUNTARY BECAUSE HE HAD AN INCOMPLETE UNDERSTANDING OF THE OFFENSES WHEN THE MILITARY JUDGE EXPLAINED THE OFFENSES USING THE

UNCONSTITUTIONALLY VAGUE AND OVERBROAD DEFINITIONS OF CHILD PORNOGRAPHY CONTAINED IN 18 U.S.C. SECTION 2256.

II. IN THE EVENT THAT APPELLANT'S GUILTY PLEAS ARE IMPROVIDENT TO CHARGE III AND ITS SPECIFICATION UNDER CLAUSE 3 OF ARTICLE 134, WHETHER HIS PLEA IS PROVIDENT AS TO A LESSER-INCLUDED OFFENSE UNDER CLAUSE 1 OR CLAUSE 2 OF ARTICLE 134 IN LIGHT OF *ASHCROFT V. FREE SPEECH COALITION*, 535 U.S. 234 (2002) AND *UNITED STATES V. O'CONNOR*, 58 M.J. 450 (C.A.A.F. 2003).

We hold that while Mason's guilty plea to the clause 3, Article 134 offense was improvident, his plea was provident to a lesser-included offense under clauses 1 and 2 of Article 134.

Background

Mason served as a contracting officer assigned to the Defense Supply Center Columbus (DSCC), an arm of the Defense Logistics Agency. The DSCC routinely handles highly sensitive and classified procurement matters, including multi-million dollar contracts. It is primarily staffed with over 2,500 civilian employees, but is also staffed by a small contingent of military members, of which Mason was a part.

The DSCC monitored its employees' access to the Internet and during the course of that general monitoring process, Mason was identified as having accessed inappropriate websites. Subsequent monitoring and investigation disclosed that Mason had utilized two different DSCC computers to (1) view and/or download from the

Internet various items with pornographic and obscene images or language; (2) participate in teen "chat rooms" and engage in discussions of a sexual nature; and (3) receive images of child pornography.

Mason was ultimately charged under Article 92 with three specifications of violating a general regulation pertaining to use of government computers, under Article 133 with one specification for conduct unbecoming an officer and a gentleman based on certain activities that he engaged in on the computers[1] n1 and under clause 3 of Article 134 with one specification of violating the Child Pornography Prevention Act of 1996 (CPPA), 18 U.S.C. § 2252A (2000).[2]

The present appeal concerns the providence of Mason's guilty plea to the Article 134 charge. For this Court to reject a guilty plea on appellate review, the record of trial must show a substantial basis in law and fact for questioning the plea. *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002) (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)).

Discussion

A. The Providence Inquiry and Record of Trial

Under the clause 3 Article 134 specification, Mason was charged with a violation of the CPPA. The military judge

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[1] This specification involved Mason's conduct in participating in teen chat rooms on the Internet and in storing, viewing, displaying, or processing various items on both government computers, including pornography, erotic stories containing obscene language and certain "thumbnail" images of naked children.

[2] This specification involved a set of images specifically characterized as "child pornography" and distinct from the ones referred to in the *Article 133* charge.

explained that the statutory offense involved the knowing receipt of child pornography that had been transported in interstate or foreign commerce and was "assimilated into the [UCMJ] as another crime or offense not capital" under *Article 134*. The military judge advised Mason that the definitions for the CPPA offense were found in 18 U.S.C. § 2256 (2000) and went on to define numerous terms, specifically including the alternative definitions of "child pornography" under § § 2256(8)(A)-(D):

> Child pornography means any visual depiction, including any photograph, film, video picture, or computer, or computer generated image or picture, whether made or produced by electronic, mechanical or other means for [sic] sexually explicit conduct where: a) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct; b) such visual depiction is or appears to be of a minor engaging in sexually explicit conduct; c) such visual depiction has been created, adapted or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or, d) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.

In addition to advising Mason of the definitional elements of the CPPA offense, the military judge included what he termed a "fourth element":

> Fourth -- and I instruct on this only in this case if it is determined that your plea is improvident on the charged offense, since the crime has been charged as an other crime or offense not capital -

> - such conduct was of a nature to bring discredit upon the armed forces or was to the conduct [sic] of good order and discipline in the armed forces.

He went on to specifically ask Mason if he understood that "fourth element" and why it had been included. After consulting with his defense counsel, Mason answered in the affirmative and indicated that he understood the element required that "his conduct must also be such to bring discredit upon the Air Force." The military judge then further explained to Mason why it had been included:

> Now, it's my position with the charged offense as it is charged in Charge III, that is not an element of the charged offense. However, in the abundance of caution, I add that as an element in case for some reason the appellate courts, if this case goes to the appeals system, determines your plea to the. . . [CPPA] charge is improvident, it would find that it was service discrediting or armed forces discrediting. That is why I have added that element.

Mason indicated his understanding as to why that element had been added, indicated that he had no questions about any of the elements and acknowledged that he believed and admitted that the elements and definitions he had been given, taken together, correctly described what he had done. He explained to the military judge that he had viewed several pictures of "minors doing lascivious poses" on his government computers and that he understood the movement of those images over the Internet was considered movement through interstate commerce. He admitted during his discussion with the military judge and in his stipulation of fact that the images were "child pornography." He also admitted during his discussion with the military judge that

his conduct was of a nature to bring discredit upon the armed forces or was to the prejudice of good order and discipline.

B. The Impact of *Free Speech Coalition* and *O'Connor*

The granted issue asks whether Mason's plea to the charged offense under clause 3 of Article 134 is provident in light of the Supreme Court's decision in *Free Speech Coalition* and our subsequent decision in *O'Connor*. The specified issue asks whether, in the event of a negative answer to the granted issue, Mason's guilty plea can nonetheless be upheld as provident to a lesser-included offense under clauses 1 or 2 of Article 134. We turn first to the granted issue.

1. The Providence of the Plea Under Clause 3

As explained to him by the military judge, Mason's conduct in receiving "child pornography" was charged as a "clause 3" offense under Article 134, with the "crime or offense not capital" being a violation of the CPPA. Thus, the criminal nature of Mason's conduct, as charged, derived from violating an independent federal criminal statute proscribing the receipt of "child pornography." *O'Connor*, 58 M.J. at 452.

The military judge defined the elemental term "child pornography" to Mason by using portions of its statutory definition that were later struck down by the Supreme Court in *Free Speech Coalition*. As occurred in *O'Connor*, the military judge's explanation to Mason of the elements of the CPPA offense utilized terms that were constitutionally overbroad. The judge's explanation made specific reference to visual depictions that "appear to be" of a minor engaging in sexually explicit conduct and materials that were pandered in a manner that "conveys the impression" that they include images of minors engaging in sexually explicit conduct. Finally, as was also the case in *O'Connor*, the record here contains no clear focus or discussion on those aspects of the CPPA not affected by the Supreme Court's ruling, i.e.,

"actual" child pornography under 18 U.S.C. § § 2256(8)(A)-(B) or "computer morphed" images of an identifiable minor under § 2256(8)(C). *O'Connor*, 58 M.J. at 452.

Under our decision in *O'Connor*, a provident guilty plea to a violation of the CPPA must reflect that the accused violated those portions of the statute not affected by the Supreme Court's ruling in *Free Speech Coalition*. 58 M.J. at 454. The absence of any focus on or discussion concerning those aspects of the statute in the present record coupled with the use of the unconstitutionally overbroad definition during Mason's plea colloquy render this case indistinguishable from *O'Connor*. Accordingly, we cannot view Mason's plea of guilty to violating the CPPA, and thus to violating clause 3 of Article 134, as provident.

2. The Providence of the Plea Under Clauses 1 and 2

That conclusion leads us to the specified issue -- can Mason's guilty plea nonetheless be viewed as provident to a lesser-included offense under clauses 1 and/or 2 of Article 134? As noted in *O'Connor*, we have recognized in the past that an improvident plea to a clause 3 offense based on a federal child pornography statute may be upheld as a provident plea to a lesser-included offense under clause 2 of Article 134. 58 M.J. at 454 (citing *United States v. Augustine*, 53 M.J. 95 (C.A.A.F. 2000); *United States v. Sapp*, 53 M.J. 90 (C.A.A.F. 2000)).

In *O'Connor*, we ultimately concluded that the guilty plea could not be viewed as provident to a lesser-included offense under the approach embodied in Sapp and Augustine. While O'Connor had stipulated to the service-discrediting character of his conduct, there was no discussion of that element by the military judge during the plea inquiry. Both Sapp and Augustine involved admissions by the accused during the plea inquiry as to the service-discrediting character of their conduct and we characterized those discussions as demonstrating that the accused "clearly

understood the nature of the prohibited conduct." *58 M.J. at 454* (quoting *Sapp*, 53 M.J. at 92).

The plea colloquy in *O'Connor* was focused solely on "the nature of the prohibited conduct" under the CPPA, without any discussion or acknowledgement of the criminal nature of the conduct deriving alternatively (and independently) from its character as service-discrediting or prejudicial to good order and discipline. 58 M.J. at 455. Absent any discussion with the military judge as to how his conduct might be criminal under clause 1 or 2 as distinct from criminal under clause 3, we could not view O'Connor's guilty plea as provident to a lesser-included offense under clause 2.

The record here is clearly distinguishable from *O'Connor* in terms of the discussion between Mason and the military judge concerning the character of his conduct as service-discrediting and prejudicial to good order and discipline. The military judge openly explained that those were not elements of the "crime or offense not capital" that Mason was charged with under clause 3 and explained why he was including the additional element. Mason indicated his understanding as to why the element had been added. In the context of his explanations that he had viewed pictures of "minors doing lascivious poses" and the images of "child pornography" on his government computer, Mason then went on to affirmatively admit to the military judge that his conduct in doing so was both service-discrediting and to the prejudice of good order and discipline in the armed forces.

The record here thus contains what was missing in *O'Connor* and was present in both *Sapp* and *Augustine*. The plea colloquy between the military judge and Mason demonstrates that he "clearly understood the nature of the prohibited conduct" in terms of that conduct being service-discrediting and prejudicial to good order and discipline. *O'Connor*, 58 M.J. at 455. Those clause 1 and clause 2 elements were explained to him as a basis for finding his

conduct criminal apart from clause 3 and his discussions with and admissions to the military judge were made in that context.

Absent some other distinguishing factor, we could deem Mason's guilty plea provident as to a lesser-included offense under clause 1 and clause 2 under the principles embodied in Sapp and Augustine. We recognized in *O'Connor*, however, that there is a distinguishing factor at play here: the impact of *Free Speech Coalition* and its creation of "a constitutional dimension that was not at issue in *Sapp* or *Augustine*." 58 M.J. at 454.

That constitutional dimension flows from the Supreme Court's extension of First Amendment protection to certain depictions of minors engaging in sexually explicit conduct, i.e., "virtual" as opposed to "actual" images. Id. at 454-55. We expressly acknowledged in *O'Connor*, but did not answer, the question as to whether, in the wake of *Free Speech Coalition*, the possession, receipt or distribution of images of minors engaging in sexually explicit conduct (regardless of their status as "actual" or "virtual") could constitute service-discrediting conduct for purposes of Article 134. Id. at 455. Such inquiry must necessarily be undertaken on a case-by-case basis.

In analyzing this constitutional dimension, the ultimate question is whether the status of the images in the present case as "virtual" or "actual" is of consequence in the context of assessing the providence of Mason's guilty plea under clauses 1 and 2. We conclude that it is not. The receipt or possession of "virtual" child pornography can, like "actual" child pornography, be service-discrediting or prejudicial to good order and discipline. Even if we were to assume that the specific images that serve as the basis for Mason's "child pornography" charge are "virtual" in nature, this still involves a commissioned officer of the United States Air Force receiving and viewing such images on a government computer in his workplace. Under those circumstances, the

distinction between "actual" child pornography and "virtual" child pornography does not alter the character of Mason's conduct as service-discrediting or prejudicial to good order and discipline.

Mason stipulated to a sexual maturity assessment of the images at issue here as depicting children between the ages of 12 and 16. He acknowledged to the military judge that the images depicted "minors doing lascivious poses" and constituted "child pornography." While the issue as to whether the images are "virtual" or "actual" may have a potentially dispositive effect in prosecutions under the CPPA in both civilian and military settings, it is not inherently dispositive of their impact on the esteem of the armed forces or good order and discipline. Those are the yardsticks by which the criminality of conduct under clauses 1 and 2 are measured. As the Supreme Court recognized:

> While the members of the military are not excluded from the protections granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.

Parker v. Levy, 417 U.S. 733, 758 (1974). Even assuming the images at issue here are "virtual," Mason's conduct in receiving those images on his government computer can constitutionally be subjected to criminal sanction under the uniquely military offenses embodied in clauses 1 and 2 of Article 134.

Accordingly, we answer the specified Issue II in the affirmative and conclude that neither *Free Speech Coalition* nor our subsequent decision in *O'Connor* provide a

substantial basis in law or fact for questioning the providence of Mason's guilty plea to a lesser-included offense under clauses 1 and 2 of Article 134.

Conclusion

The specification of Charge III is amended to read as follows:

> In that MAJOR ROBERT L. MASON, JR., United States Air Force, 88th Mission Support Squadron, Wright-Patterson Air Force Base, Ohio, did, at or near Defense Supply Center, Columbus, Ohio, on divers occasions between on or about 8 July 1998 and on or about 2 November 1999, knowingly receive one or more images of child pornography ~~that had been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer, in violation of 18 U.S.C. 2252A~~.

The decision of the United States Air Force Court of Criminal Appeals is affirmed as to Charge III and its specification as amended, as well as to the remaining Charges and their specifications and the sentence.

CRAWFORD, Chief Judge (dissenting in part and concurring in part):

Because I agree that Appellant's plea was provident to a lesser-included offense under clauses 1 and 2 of Article 134, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 934 (2000), I concur in the majority's affirmation of Appellant's conviction. Nevertheless, I disagree that Appellant's guilty plea was improvident to the clause 3, Article 134 offense.

First, Appellant waived the *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), issue by failing to address it at trial.

> When Appellant learned of his charge under *Article 134*, clause [3], for violating the Child Pornography Prevention Act (CPPA), 18 U.S.C. § 2252A (2000), he neither took exception to the charge generally, nor alleged that the basis for the charge - the CPPA - was unconstitutionally vague and overbroad. In so doing, Appellant cannot now be afforded relief on the very grounds he himself failed to raise, and therefore waived.

United States v. O'Connor, 58 M.J. 450, 456 (C.A.A.F. 2003) (Crawford, C.J., dissenting).

Moreover, the record establishes Appellant's understanding that the pornographic images based on which he was convicted depicted actual minors.

> When evaluating the providence of a guilty plea, "rather than focusing on a technical listing of the elements of an offense, this Court looks at the context of the entire record to determine whether an accused is aware of the elements, either explicitly or inferentially." *United States v. Redlinski*, 58 M.J. 117 (C.A.A.F. 2002) (emphasis added). "There need only be 'factual circumstances' on the record 'which "objectively" support' the guilty pleas, *i.e.*, that actual minors were in appellant's pictures." *United States v. James*, 55 M.J. 297, 300 (C.A.A.F. 2001) (quoting *United States v. Shearer*, 44 M.J. 330, 334 (C.A.A.F. 1996)).
>
> In *James*, this Court considered the following colloquy in evaluating the providence

of the appellant's guilty plea to violating the pre-*Free Speech Coalition* CPPA:

> Q. The term "child pornography" [under the CPPA] means any visual depiction . . . involving the use of a minor engaging in sexual [sic] explicit conduct. Such visual depiction is or appears to be of a minor engaging in sexually explicit conduct[.]
>
> . . . .
>
> Q. Now, why do you believe that - as far as describes those files - why you believe the files to be described as child pornography?
>
> A. Well, they depicted young females under the age of eighteen, which as you stated, that they, uh, they are minors. I believe that the pictures depicted minors under the age of eighteen and at least four contained minors engaged in sexual activity.
>
> . . . .
>
> Q. Do you believe that one of those persons involved in that conduct was a minor?
>
> A. I believe the person in the picture was under eighteen, yes, sir.

> 55 M.J. at 301 (emphasis added). The Court noted that through these words, the appellant "admitted that actual minors were in the charged pictures" and that these admissions were "amply supported by the pictures themselves." *Id.* at 300-01. The Court then concluded that "the factual circumstances reflected in the record 'objectively support' appellant's guilty pleas to possessing and transporting child pornography depicting actual minors." *Id.* (emphasis added). In short, although the appellant did not supply the adjectives "real" or "actual," and although the judge defined "pornography" in pre-*Free Speech Coalition* terms, this Court inferred from the language the appellant did use - "young females" and "minors" - that the images involved actual minors. See *Redlinski*, 58 M.J. at 117 (noting that providence may be confirmed by the record inferentially).

Id. at 456-57.

In the instant case, Appellant admitted during the providence inquiry that "several of the pictures [he's] looked at were child pornography, that is, minors doing lascivious poses" and that the pictures he viewed on his computer were "images of naked children." Moreover, in his stipulation of fact, Appellant listed the internet sites from which he obtained child pornography. He then admitted as follows: "All of the images listed directly above and as attached to this stipulation of fact depict children who are between the ages of 12 and 16 according to a sexual maturity assessment." The descriptive terminology Appellant used - "naked children," "minors," and "children who are between the ages of 12 and 16" - was very similar to the terminology in *James*, particularly given the near equivalency in meaning of the words "minor" and "child." See Black's Law Dictionary 1011 (7th ed. 1999) (defining "minor" as "[a]

person who has not reached full legal age; a child or juvenile")(emphasis added). Finally, as in *James* and *O'Connor*, the pictures attached to the record in this case amply support Appellant's awareness that the images involved actual minors.

For these reasons, I would hold Appellant's plea provident to the clause 3, Article 134 offense. In any event, I concur in the majority's result, as I would also hold Appellant's plea provident to a lesser-included offense under clauses 1 and 2 of Article 134.